IN THE SUPREME COURT OF FLORIDA

KIRK DOUGLAS WILLIAMS,

Appellant,

v. **CASE NO. SC08-965**
L.T. CASE NO. 06-CF-788

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE FIRST JUDICIAL CIRCUIT, IN AND FOR WALTON COUNTY, FLORIDA

INITIAL BRIEF OF APELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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CONSTITUTIONS AND STATUTES

STATEMENT OF THE CASE AND FACTS[1]

On December 21, 2006, the Walton County Grand Jury indicted appellant, Kirk Douglas Williams, for first-degree premeditated murder with a weapon in the death of Susan Dykes. 1:79-80.

On February 11-14, 2008, Williams was tried before a jury.

Guilt Phase

On Saturday, October 7, 2006, Holmes County Sheriff's deputies recovered a woman's body from Lake Cassidy, in Holmes County. The body had been tied to three concrete blocks with white strapping tape. Investigator Eaton, who was at the scene when the body was pulled from the water, testified that one piece of the tape was tied around her feet, another piece was across the center of her torso, another piece was underneath her breast area, and a fourth piece was around her head across her mouth. Each piece of tape was tied to a cinder block on the back side of her. The tape was marked Mule tape by Nefco and had sequential numbers of measurement on it. The woman had a tattoo on her right arm which read, "The Bull Stops Here." 8:55-58, 62-65.

[1] References to the twenty-volume record on appeal are designated the volume number and the page number. References to the two-volume record of exhibits are designated by "E" followed by the volume number and the page number. All proceedings were before Fort Walton County Circuit Judge Kelvin C. Wells.

On Monday, October 9, 2006, Holmes County investigators identified the dead woman as Susan Dykes, a Walton County resident. 8:70-71. Investigators from Holmes County met Walton County Investigator Herb Haigh at Dykes' residence at 93 Van Gogh Court, DeFuniak Springs, where they found an aluminum boat leaning against the back of the trailer with a blanket with suspected blood underneath. In the grass near the rear deck, they found a piece of Mule tape of the same type as that on the body, and on the deck they found three cinder blocks similar to those attached to the body. 8:71-73, 9:208-209, 10:407-411.

After obtaining a search warrant, Walton County investigators and crime scene analyst Chuck Richards searched Dykes' trailer. The front door was locked with a deadbolt but they were able to open the back door knob with a pocket knife. On the inside was a hasp lock, which they cut with a hacksaw. 9:209, 10:411-413. In the master bedroom, they found a bloodstain on the carpet next to the bed, a blood spot on the side of the box springs, and some blood spots on top of the mattress, which was bare. Near the stain on the floor was a white towel, a bottle of Resolve carpet cleaner, and a piece of the Mule tape. There was some smearing of the blood as if someone had tried to clean up. They collected a small aluminum T-ball bat from the floor of the master closet, a pair of Boxer blue jeans at the entrance to the dining/kitchen area, and a

white tee shirt that was underneath the jeans, all with suspected blood. They also collected the boat, a blanket and sheet underneath the boat, the Mule tape in the grass, and a paddle, bungee cords, and more Mule tape that was in the boat. 9:210-213, 10:276. Mail addressed to Williams was found inside a red and black backpack in the living room. A tan backpack contained Mule tape. 10:414-415. Later, possibly on October 12, Investigator Haigh collected a pair of Jordache jeans and a towel with blood on them from Dykes' daughter, Jennifer Guess. 10:367-370. Guess testified she was clearing out her mother's mobile home when she found the jeans and towel midway down in a clothes hamper that was in the center of her mother's bedroom. 8:78-79.

In the yard at Dykes' residence was a white Cavalier registered to Kirk Williams with an address of 375 Hillcrest Court, which was the residence of Gillis Douglas, Williams' father-in-law. There, at 375 Hillcrest, they found Dykes 1995 gold Saturn. 8:125-128. They also learned that Douglas owned the boat found at Dykes' trailer. Douglas kept the boat in the back behind the pole barn, behind another little shed, and didn't know it was gone until the police asked him about it. 8:135-140. The trunk and roof of the Saturn had scrape marks that were about six inches apart. 10:252-253. The bottom of the boat had ribs, also about six inches apart. 10:273-274.

The deputies also learned that Williams was in jail, having been picked up for failure to appear by bail bondsman Buel Mooney on Friday, October 6. Mooney testified he found Williams in a shed at 375 Hillcrest Court, working on a vehicle. Williams went with Mooney voluntarily. 8:187-192. Haigh later retrieved the keys Williams had in his possession when he was arrested, which included a key to Dykes' car and a key to the deadbolt lock on her front door. 11:460-462.

Dykes' landlord, Don Cloer, lived at 124 Van Gogh Court. Dykes paid $300 a month in rent plus the utilities. Cloer testified that Williams was living with Dykes in August 2004. (Cloer was unable to identify Williams in court). Cloer said he hadn't seen any comings or goings from her residence between Monday, October 2, and Saturday, October 7, but since he usually sat on the back deck of his home, he wouldn't have seen her coming and going. He said he reported her missing to the Holmes County Sheriff's Department on Saturday, October 7, and that his neighbors had told him about a body found in the lake the day before, Friday, October 6. He said he last saw Dykes late Tuesday afternoon when she came to pay the water bill. 8:93-98.

Christopher and Carol Richards lived across the street from Dykes. Mr. Richards said Williams was living with Dykes in the weeks before her death and he had seen Williams driving her Saturn once or twice. Williams drove his white Chevrolet for a

while, and then parked it and began working on it. Richards last saw Dykes on Saturday, September 30. On Wednesday, October 4, around 6-6:30 a.m., Richards was outside starting his car to go to work when Williams pulled up in the Saturn with a flat-bottom boat tied to the top. Williams got out, got back in, and pulled in behind the trailer. The next day, Thursday, October 5, sometime after 4:30 p.m., Richards saw Williams enter the trailer, come out carrying a small box, and then leave. Also, on either Thursday or Friday morning, before 6:30 a.m., Williams pulled up next to the trash bin, looked into the windows of his car, and left. 8:102-111.

Carol Richards testified Williams had been at Dykes' residence regularly for about a month and was there morning and night the week before Dykes' was killed, working on his car. Mrs. Richards last saw Dykes on Sunday, October 1. On Tuesday, October 3, around 6:15-6:30 a.m., she saw a tan Bronco with mud tires and what looked like an Alabama tag parked in the driveway. She didn't see anyone around the car. On Wednesday, October 4, around 6:30 a.m., she saw Williams drive up in Dykes' car with a boat tied on top. Williams got out, probably to move the dog, got back in, and moved the car behind the trailer. Mrs. Richards called the landlord, Mr. Cloer, to let him know that Kirk was at Dykes' house. Cloer had been asking about Dykes the night before, October 3, because she owed him rent

money and had asked Ms. Richards to call him if she saw Dykes come in. That night, Williams pulled into the driveway, retrieved a small wood grain case from the trailer, and left. On Thursday morning, he pulled up to the trash bin, walked across the yard, shined a flashlight into his car, and left. 8:113-123.

Erica Rudolph worked at D-Train Security Agency in October 2006, where Dykes was employed as a security officer. Rudolph testified the usual practice was for security officers to call the office upon arrival at a job site to report when they arrived and where they were. Ms. Rudolph took a lot of the calls and could recognize Dykes' voice. Rudolph testified Dykes called at 9:30 a.m. on Tuesday, October 3. 9:193-196. Rudolph documented the conversation in a "D-Train Security Agency Incident Report." E1:159.[2] In the handwritten note, Rudolph wrote that Dykes called the office wanting to know why she had not been informed that her present job was ending on October 6, 2006. Rudolph told Dykes to ask the person on the site who had told her this to send the Agency a fax stating that the Agency's services were no longer needed. Dykes asked to be placed somewhere else when the job ended, and if they couldn't give her forty hours, she wanted them to lay her off so she could collect unemployment, or give her a good recommendation so she could

[2] The D-Train incident report is attached herein as **Appendix A**.

find another job. Rudolph testified she remembered all of this because she wrote it down. She didn't remember whether Dykes reported for work the next day, Wednesday, the 4th. 9:201-203.

Leon Anderson testified he was captain of the street patrol and security division at D-Train and that Dykes was under his supervision. Asked what he recalled about October 4, 2006, Anderson said, "If I'm not mistaken I received that Ms. Dykes did not show up to work. When they report to work they have to call the answering machine and pretty often we check the post itself. But with Ms. Dykes she's only missed one day when she's been working for me and I only checked her when she first started working here. After that I didn't have to check her anymore because she was always on time and never missed a day. That day she failed to come to work." Anderson said he was unable to reach her by phone, and when he went to the job site, she wasn't there. He wrote her a letter advising her to contact the supervisor when she was taking days off. The next day, or October 6, he got a call from the Sheriff's Office. This would have been after her body was recovered. 9:203-204.

In Dykes' Saturn, police found a set of car keys; an empty pack of gum; four Regions Bank ATM receipts dated October 3, 2006; two Wal-Mart receipts; two receipts from Murphy USA (a gas station on the premises of Wal-Mart); and an Auto Zone receipt. 10:249-260. In Williams' Cavalier, police found a business card

from Mooney Bonding Agency, indicating a date to appear, October 4. 11:427. Also in the Cavalier were twelve Regions Bank ATM receipts dated August 20, 2006. 11:428. Police obtained surveillance videos and still photos for the ATM transactions and the purchases at Wal-Mart, Murphy USA, and Auto Zone. 11:433-436, 449, 452-458.

The receipts and videos showed that on October 3, 2006, Williams made four ATM withdrawals from Dykes' account. He withdrew $100 at 12:12 a.m., another $100 at 1:49 a.m., another $100 at 4:49 a.m., and $200 at 6:06 a.m. The third and fourth withdrawals left Dykes with a negative balance. 10:267-268. That same Tuesday morning, at 5:12 a.m. he purchased a sponge, ring light, safety hasp, and brass lock at Wal-Mart. 10:269, E2:295. In the Wal-Mart video, Williams was wearing long pants, a white sleeveless undershirt, and sandals. 11:444. Then, at 9:51 a.m., Williams bought a 3/8 D.R.S.C.K.T. socket for $19.99 at Auto Zone. 10:271.

Haigh testified that the body style of the car in the surveillance tapes correlating to the Regions Bank ATM withdrawals on Tuesday, October 3, 2006, was consistent with Dykes' gold Saturn. Haigh said the car appeared to be Dykes' Saturn because "it's got a small door frame" and a dent in the molding matched a ding in Dykes' Saturn. 11:458.

The receipts and videos showed that on Thursday, October 5, Williams purchased gum at Wal-Mart at 5:13 p.m. At 9:44 p.m., he bought $9.01 of gas at Murphy USA. At 9:47 a.m., Williams bought snacks and cigarettes from the same store. 10:269-271. The October 5 Wal-Mart video showed Williams and his wife, Callie, at the counter. The body style of the car at the Murphy station was consistent with Dykes' Saturn. 11:449-454.

A different card was used for the August 20, 2006, withdrawals. 11:491-492. The receipts and videos showed Williams withdrew $30 at 3:35 p.m.; $80 at 4:24 p.m.; and $100 at 6:08 p.m. The account had a negative balance before the first withdrawal was made. The remaining receipts showed declined transactions that evening at 8:39, 8:41, 8:41, 8:41, 9:59, 9:59, 10:00, 10:00, 10:00, and 10:29 p.m. 11:433-436. Haigh testified the car used in the August 20 ATM transactions was not Dykes' car. 11:436

After finding the Wal-Mart receipt showing the purchase of the hasp and lock, Investigator Haigh compared the hasp that had been cut off the back door of Dykes' trailer to the hasp indicated by the Wal-Mart receipt and concluded they were the same. 11:440-447.

Police recovered Dykes' cell phone, which was plugged into a charger at her residence. Eleven outgoing calls, two incoming calls, and four missed calls had been saved on the phone. On

Friday, September 29, there was an outgoing call at 14:11, to Sergeant Lilly (D-Train). On Saturday, September 30, there were four outgoing calls, at 12:19, a misdial to 837-3001; at 12:19, a call to 837-2001; at 8:07, a call to Captain Anderson (D-Train); and at 20:58, a call to Jennifer Guess. On Sunday, October 1, there was an outgoing call at 18:27 to Don Cloer. On Monday, October 1, there were five outgoing calls, at 9:15 a.m., to the D-Train office; at 10:14 a.m., to Don Cloer; at 11:58 a.m., to Jennifer Guess; at 12:07 p.m., to Jennifer's workplace; and at 9:48 p.m. to Williams' cell phone. The two incoming calls were on September 30, at 22:03, from Kirk Williams, and Monday, October 2, at 14:47, from the D-train Office. The missed incoming calls were on September 30, at 8:06 a.m., from Captain Anderson (D-Train), and at 20:57, from Jennifer Guess; and on Wednesday, October 4, at 7:31 a.m. from Captain Anderson (D-Train), and at 15:33, from Captain Anderson (D-Train). 11:472-478, E2: 278.[3]

Haigh testified theft of anything $300 or more in value is grand theft, which carries a possible prison sentence. Dykes had not charged Williams with theft based on the August 20 transactions. 12:491-492. The maximum penalty for a misdemeanor is less than a year in jail. 12:512-515.

[3] The summary of the phone calls saved on Dykes' cell phone is attached herein as **Appendix B**.

Haigh prepared a summary of the pieces of Mule tape found at different locations. The number on the piece found in Dykes' back yard and the number on one of the pieces found in the tan backpack corresponded to the piece of rope tied to Dyke's feet. Another piece from the backpack corresponded to the piece of rope around Dyke's head. 12:504-509.

Crime lab analyst Jay Kelchak testified he received two pairs of blue jeans, a white tank top, bedspread, fitted sheet, aluminum bat, white towel, and swabs of suspected blood from the floor by the bed, the side of a box spring, and the top of a mattress. 10:372. The blood from the aluminum boat, the carpet stain, the Jordache jeans, and the top of the bat matched Dykes. Dykes was the major contributor to the mixture of DNA found on the bat handle. The minor profile, probably from epithelial cells, was male and included Williams as a possible contributor. Dykes also was the major contributor to the mixture of DNA in the blood on the bedspread. Williams could not be excluded from the minor profile, which was male. 10:376, 379, 383, 390, 392, 394, 396.

The blood on the thigh area of the Joe Boxer blue jeans matched Williams. 10:385. The white tank top was negative for blood. 10:387.

Kelchak testified he did not test the towel "due to where it was found at the scene." Because it was located immediately

adjacent to the large stain on the carpet, someone decided it was unnecessary to test the towel. 10:388. He also didn't test some of the other swabs. 10:397.

Dr. Cameron Snider, Associate Medical Examiner, testified the autopsy was conducted by Dr. Charles Siebert on October 9, 2008.[4] Dr. Snider reviewed Siebert's report, photographs, and other evidence, and concurred with his conclusions. 10:288-291.

Dr. Snider testified Dykes was 5'1" and 95 pounds. The body, clothed in a black T-shirt, was bloated due to having been in the water. Nylon cords were wrapped around the upper and lower body and tied to cinder blocks. The cinder block at the mid-back was secured by rope around the chest, and the cinder block near the right hip was secured by rope around the waist. The feet were thrust through the third cinder block. A rope around the mouth was secured around the back of the head with a knot, not attached to any cinder block. 10:308-310.

The cause of death was blunt force trauma. Dykes sustained five injuries to the head, from 3 to 7 centimeters in length, two injuries on the right, above and behind the ear, and two injuries on the left, above and behind the ear, and a fifth in front. There also was a small laceration to the chin. The head injuries were from a blunt force instrument striking the head

[4] Dr. Siebert had stepped down as Medical Examiner in December 2007.

and were consistent with having been caused by a bat. There also were injuries underneath the scalp and on the surface of the brain. The lacerations to the forehead and right side caused bruising and bleeding on the surface of the brain, which is called a subdural hematoma. Dr. Snider could not say which blow or blows caused the bleeding. 10:310-313, 330.

Dr. Snider said the first blow could have resulted in death and each of the blows could have resulted in unconsciousness. There was no way to know which blow was delivered first or which blow caused the bleeding. The blows could have been delivered in seconds. 10:331-332.

Dr. Snider also found animal activity to the right hand and a broken carpal bone, which seemed to have gnaw marks. Hemorrhage next to the fracture indicated injury, but Dr. Snider could not say if the injury was there first or if the injury came from the animal activity, such as the bite of a snapping turtle. 10:333-339, 352.

Although the exact time of death could not be determined, the body was consistent with having been placed in the lake three to four days prior to removal. 10:328. Dykes had a blood alcohol level of .07, which could be the result of decomposition processes. No other illegal substances were found. 10:316-317.

Three jailhouse informants testified. William Hawley had 19 to 20 felony convictions, some involving dishonesty, and had

been in prison for thirteen or fourteen years. He had one more year on his original sentence, then another fifteen years for escape. Hawley said he talked to Williams at the Walton County Jail in June 2007. Hawley was there for twelve hours while being transferred from one prison to another. He was given a temporary bed in the dayroom of a locked down area. Williams was in one of six or seven cells that were on one side of the dayroom. Hawley said he talked to Williams through the door and they could see each other through an 8" by 3' glass window in the door. Hawley said Williams showed him the death penalty notice he had received and talked about problems with his attorney and discharging his attorney. He asked Hawley how to "beat a murder case when there's no confession." He told Hawley he was on a crack cocaine binge and was abusing the victim's ATM and credit cards. She threatened to turn him in because he was using the cards. They got into a physical confrontation over his use of the cards and he beat her with a baseball bat and she died. He took the body out to Lake Cassidy, wrapped it up in a rope and blanket, and threw her in the lake. He said once he started, he knew he had to kill her and get rid of the body because he didn't want to go back to prison. He had been in prison twice and didn't want to go back. He said he had been in prison for possession of a shotgun by a convicted felon. He showed Hawley pictures of his wife and infant and said he had

been caught on the jail surveillance tape instructing his wife to dispose of some evidence. 12:526-537.

Hawley had assisted in "dozens" of cases over the years. He hadn't received credit or leniency but had gotten paid for his assistance. In this case, the prosecutor promised he would advise the court of his cooperation in the case. 12:538-544.

Bill Shirah, III, was in the Walton County Jail for violation of a domestic violence injunction, two counts of child abuse, and violation of probation on an illegal dumping charge (on which he faced two years in prison). He also had two misdemeanor theft convictions. Shirah had met Williams several years earlier at the Waffle House, when Williams and Shirah's wife both worked there. Shirah also had been in jail from August 2 to December 4, 2007, and talked to Williams sometime between October 31 and November 30, 2007. Shirah was angry with his wife at the time and told Williams he felt like he was going to kill her. Williams told him he didn't want to do that, "you don't know what it's like; what you have to live with, not being able to sleep or anything, when you kill someone." Shirah asked him what he was talking about, and Williams said Dykes was coming home with $80 worth of crack every day. He didn't know where she was getting it. He was on drugs and killed her with a baseball bat for the drugs. He killed her because of the crack

cocaine. He showed Shirah a paper showing the state was asking for the death penalty. 12:552-559, 564-565.

Shirah said he had asked the prosecutor for help getting a bond, and the prosecutor said he'd see what he could do. He also asked for help for his brother on possession of a shotgun by a convicted felon charge, and the prosecutor promised to send someone to talk to him because he had information about drugs. 12:560-562.

Joseph Cordell was serving twelve years at Lake Butler on nine counts of burglary and six counts of grand theft. He had been in Walton County Jail from November 7, 2007, until January 9, 2008. He shared an eight-man cell with Williams and talked to him sometime in December. Williams told him that he and Susan were at a friend's house. They had bought pot and crack and were smoking pot. Susan told Williams she wasn't going to give him any crack, and they started arguing. The guy asked them to leave, and they went to Susan's house. Susan confronted Williams about stealing her money and said she wasn't going to smoke any more crack with him. He had taken money out of her bank account using the ATM. They were arguing, and they had knocked some tools over, and there was a bat, and he picked it up and hit her in the head with it. He put her body in a blanket and put her in the trunk. He got a canoe of some kind,

put it on top of the car, and took the body to Lake Cassidy and threw her out. 12:566-574, 583.

Cordell said the prosecutor promised him that he'd "put in a good word" for him and try to get him a lighter sentence if he could get a hearing before the judge who sentenced him. 12:577.

Callie Williams, 19, testified she and Williams got married on March 17, 2006. He lived with her at her parents' house for about two months until her dad kicked him out. After that, they continued to see each other. On August 20, 2006, Callie was with Williams when he withdrew money from the ATM at a bank. The first time, they were in Williams' Cavalier, and he used Dykes' credit card. The second time, they were in Dykes' car. There wasn't a time when he couldn't get money when she was with him. 12:585-587.

On Tuesday, October 3, 2006, Williams came over to her house around noon, and they did crack together. They were together until 9 p.m. Williams was wearing blue jeans, sandals, a long pair of socks, and a white tank top. They went to the junkyard in Callie's car to get a fuel pump for his Cavalier. They also used Dykes' car. They went to Dykes' residence twice that day, during the daylight hours. The first time they went to get a gas can and a knife. The second time, Williams went in the house and told her to stay outside. 12:587-591. Both times they went to Dykes house, Williams was driving. 12:603-604.

Williams dropped her off at her house around 9 p.m., and then came back around 10 and knocked at her window. She opened it, and he climbed in. He had some crack, and they did the crack, and then they both went out the window. Williams went to get more crack, while she waited outside. He was using Dykes' car and parking by the mailbox. He came back with more drugs, they smoked it, and then he left again. When he returned the next time, he parked the car in the woods and was dressed in different clothes, shorts, wife-beater t-shirt, and tennis shoes. She could not see where he parked but saw him walking up from the field. They did more drugs and talked the rest of the night. Around 4:45 a.m., she made tea, he drank it, and then he left. 12:591-595.

Callie next saw Williams on Thursday, October 5, when they went to Wal-Mart in the Saturn. He bought gum with a check she got from her mom and got cash back to repay a debt. They also went to Dykes' home, and she waited in the car while he walked behind a building and then returned. 12:595-596. On Friday, October 6, he came to see her in the Saturn. He was working on a junk car in her dad's barn when she left for work. An hour later, he called to say he had been arrested. 12:596-597.

Williams called her from jail several times between Friday, October 6, and Monday, October 9. In one call, he asked her to go to Dykes' house, get a blanket and rope that were under a

boat, and put them in his car. He also wanted her to find a piece of paper in his car that indicated when he was due in court. He thought the card said October 9, instead of October 4. He asked her to come to the jail to get the Saturn keys so that she could get into the Saturn to get his Cavalier car key.

During that time in October, she and Williams were both doing a lot of crack cocaine. He usually went and got the cocaine. She went with him one time and stayed in the Saturn while he got the crack. 12:598-604.

A tape recording of the jailhouse conversation between Williams and Callie, consistent with Callie's account, was played for the jury. The call took place on October 8, 2006. 12:614-623.

During deliberations, the jury asked two questions. The first question was: "How did Susan call D-Train office on the 3rd? It does not show any outgoing call from her phone. Did she use someone else's phone or phone on the job site?" The next question asked: "Could we get copies of Callie Williams testimony and the testimony of Mr. and Mrs. Richards." By agreement of both parties, the judge answered the first question by telling the jury that all the evidence had been placed before them and to use their own recollection of the testimony, exhibits, and instructions on the law in forming their opinion. As to the second question, the judge told the jurors that he did

not have transcripts of the testimony of Callie Williams and Mr. and Mrs. Richards and they would have to rely on their own recollection of the testimony during the trial. 13:712-715.

The jury found Williams guilty as charged. 13:716; 3:403.

Penalty Phase

The following day, February 15, 2008, the penalty phase was held. The state presented no additional testimony or evidence. The defense presented one expert and two lay witnesses.

Dr. James Larson, a forensic psychologist, testified that he met with Williams five times and gave him a battery of psychological tests, including intelligence and achievement tests, personality tests, testing for malingering, and risk assessment tests to determine whether he would be a danger in a controlled population such as prison. Dr. Larson also reviewed the discovery, including lengthy police reports, photographs of the crime scene, and other exhibits. Dr. Larson also took a psychosocial history from Williams, which was confirmed by his aunt. 14:727-732.

Dr. Larson testified that Williams had a long history of polysubstance abuse. He had used crystal meth, cocaine, crack, Trazedone, Lortab, Soma, and possibly others drugs. Prior to his arrest, he had been using cocaine heavily. In Dr. Larson's opinion, Williams had cocaine addiction/dependency. 14:733.

Dr. Larson described Williams' childhood as disadvantaged and "tragic in many respects." His mother married at age 14, then divorced. Neither Williams nor his mother know who his father is. When Kirk was about two years old, his mother and stepfather were convicted of child abuse in the death of a sibling. Both served prison terms. Initially, the charge may have been murder. While Williams' mother was in prison, his aunt cared for him. When his mother got out of prison, he was transferred back to her for a while. Then, when the aunt found out his mother was going to sell him, she took him again. When his aunt became physically ill and could no longer care for him, he went back with his mother for a short time, and then his mother very quickly arranged for him to live with some relatives in Georgia. He was placed in foster care until he was seventeen or eighteen and then came back and lived with his aunt. His mother may have been abusing alcohol during her pregnancy with him because his test results indicated he may have Fetal Alcohol Effect Syndrome. In sum, he had "quite a chaotic childhood background, which also included physical and sexual abuse." 14:735-736.

School was difficult for Williams, and he did not do well. According to Dr. Larson's testing, he reads at an average level but his math skills are just above the retarded range. This type of difference indicates a learning disability, which is

sometimes referred to as neuropsychological impairment. 14:737. He had a verbal IQ score of 90, a performance IQ of 110, and a full-scale IQ of 98. 14:739. The 20-point spread between his verbal IQ and his performance IQ is statistically and clinically significant and indicates he has brain damage, which was one reason Dr. Larson thought he probably has Fetal Alcohol Effect Syndrome. His mother's alcohol abuse during his gestation was a likely reason for the brain damage. He also had a lot of scatter on the sub-tests, which is unusual. Thus, even though he has a normal IQ, the tests results were not normal and indicate mild brain damage. 14:738-741, 758.

On the achievement test, he scored in the average range on word reading, sentence comprehension, and spelling, that is, at the eleventh to twelfth grade level. In math, he was at a fourth grade level, another red flag indicating underlying brain disease. The IQ and achievement testing were consistent with a history that he was diagnosed with Attention Deficit Hyperactivity Disorder as a child and placed on medication, Ritalin. 14:741-742.

Dr. Larson found no evidence of psychosis or a formal thought disorder. 14:738.

Dr. Larson also gave Williams several personality tests, which allowed Larson to compare him to other inmates, including the Minnesota Multiphasic Personality Inventory-2 (MMPI-2),

along with the Megargee Classification System, and the Millon Clinical Multiaxial-3. The tests indicated Williams did not have socially deviant or anti-authoritarian attitudes and would likely be a docile, quiet inmate. Although Williams does not have any well-defined personality disorder, the tests indicated depression and dependency. He also had some borderline personality features, meaning his personality is not real stable. He may have a lot of emotional ups and downs. "He's the kind of person to be dependent upon another person, the kind of person who would abuse substances, the kind of person who would not be overly ambitious in life or do particularly well economically." 14:744-750. Dr. Larson concluded from the MMPI that Williams' personality "is not one that's usually found in a criminal population." The scale that measures criminal defiance wasn't much more elevated than it is with attorneys. The test did indicate he might be a drug addict as he scored high on the chemical dependence indicators. 14:763-764.

The risk violence assessments indicated that Williams has little risk of violence in prison. His major risk factor was substance abuse. Thus, if he got drugs in prison, he would be at increased risk for violence. 14:751-753, 767.

Dr. Larson testified that although Williams denied killing Dykes, he showed remorse indirectly. Whenever he talked about Dykes, he became tearful, talked about how he missed her and

loved her, choked up and couldn't continue. He had to take a break several times to regain his composure. Asked whether advice to another inmate not to kill his wife because he would have to live with it for the rest of his life indicated remorse, Dr. Larson said "absolutely. That's exactly what remorse is, when we engage in something we wish we hadn't done and then we feel badly about it and express that later." 14:753-754, 770-771.

Dr. Larson testified he was aware that Williams was emptying out Dykes' bank account up to the time of the murder, that he was using crack cocaine at the time of the murder, and smoking crack with his wife afterwards. He was aware that Dykes was hit repeatedly with a bat and that her body was hidden in the lake. In his opinion, although Williams could appreciate the criminality of his conduct, his capacity to conform his conduct to the requirements of the law was substantially impaired because he was strung out on crack. 14:756. In Larson's opinion, the murder was incidental or drug-related, not characteristic of the way Williams lives his life. 14:770. His ability to control his behavior was substantially impaired because of the cocaine. 14:772-773. "My experience with a crack cocaine binge is that when they're on a binge they'll do – their judgment becomes so impaired, that they have poor control of their behavior. They'll do almost anything to get more

drugs, so they don't conform their behavior to the requirements of law. I've seen it hundreds of times." 14:773. Although not everyone on a cocaine binge ends up killing someone, "it's not unusual for people on a crack cocaine binge to keep using, keep using and then start engaging in criminal conduct to get more money so they can use some more." 14:774.

Dr. Larson said he attempted to obtain Williams' school records and discussed this with his attorneys, "and they didn't arrive, so I didn't have a chance to review them." He also was frustrated in his attempts to get Williams' Bridgeway records. 14:759-760. Also, when asked what Williams told him about October 3 and 4, Dr. Larson could not find his notes, "those notes must have been misfiled." 14:776.

In Dr. Larson's opinion, this was a situational crime, as opposed to the type of crime that is planned out well in advance and carefully executed with a clear mind. Williams was described as someone who walks away from conflict, and he didn't have a major history of violence. Based on the discovery and the psychological testing, Dr. Larson concluded the murder was a function of the cocaine binge, including the desire for more cocaine. 14:778-779.

Betty Gulliver, Williams' maternal aunt testified that she got Kirk when he was two weeks old and kept him for three years, when he was returned to his mother. She got him back when he

was eight or nine years old. Then, she became very sick and took him back to his mother. During the time she cared for him, he never gave her or her husband a hard time or disrespected them in any way. 14:780-782.

Mrs. Gulliver said Kirk has two children, Haley, 5, and Amelia, fifteen months. She keeps Haley, and Kirk visited her all the time before he was incarcerated. He showed affection toward his children. Mrs. Gulliver had never seen Williams violent. 14:783-784.

Pam Miller testified she had known Williams for about nine years. Williams worked for her and her husband in their lawn business. Williams was very kind and courteous, a "nice, kind, gentle person." He was a hard worker and treated the customers very well. Miller frequently was asked by her customers if she knew anybody who would clean their houses who was as kind and courteous. He was a good father. He brought his daughter Haley to her house one day and she just clung to him. 14:785-788.

After argument and instructions, the jury recommended the death sentence by a vote of 11 to 1. 14:856.

Spencer Hearing

On April 1, 2008, the court held a Spencer hearing. The court received sentencing memoranda from both parties.[5]

[5] The sentencing memoranda are attached herein as **Appendix C** and **Appendix D**.

The defense introduced into evidence a copy of the COPE Center records, documenting Williams' substance abuse treatment. 16:12-13.

Williams, 29, testified. He said he was taken from his mom after he was born, and his mom and step-dad went to prison. Williams was placed with his aunt Betty Gulliver while they were in prison. He was placed back with his mom when he was two, and stayed with her until he was eleven, when he moved back in with his aunt. He went back to his aunt because his mom had split up with her husband and he felt like he was "in the way." His brother, Richard Eckels, and sister, Tammy Mills, also were removed from his mother's home. He was sexually abused by one of his step-fathers when he was eleven years old. From age thirteen to sixteen, he lived with three different foster families in Georgia. The last high school he attended was Jenkins County High in Georgia. He dropped out in ninth or tenth grade, when he came back to Florida, and began working. Over the years, he had done housekeeping, framing, carpentry, and fast food for multiple employers. 16:14-20.

He went to prison the first time for violation of probation on a grand theft auto charge he picked up when he was eighteen, nineteen. He violated probation again and decided to do the prison time, eighteen months. In prison, he worked towards his GED but wasn't there long enough to complete the program. He

got out in a year due to good behavior. Three years later, he was convicted of possession of a firearm by a convicted felon. He liked to hunt and was caught with a shotgun. He got 13.4 months and during that sentence, he worked on the street on a DOT work squad. He got gain time on that sentence also. After that, he was arrested for a couple of misdemeanors, possession of paraphernalia charges. He also had two misdemeanor batteries. One involving his ex-girlfriend started off as domestic battery but got dropped to simple battery, for which he got six months probation. 16:20-25.

Williams said he had used drugs since he was eighteen, nineteen. He started with marijuana and went on to cocaine, crack, meth, and pills. 16:25.

Asked if there was anything else he wanted to say to Judge Wells, Williams said he couldn’t testify during the trial because he felt like he would be very emotional. He said he did not kill Susan but he did come home in the early morning hours of October 3 and found her dead in her bedroom. He didn’t call the law because he was high on crack cocaine and paranoid and felt he would be blamed for it. The body stayed in the trailer all day Tuesday, and he moved it to Lake Cassidy in the early morning hours of October 4. How she was dressed in the lake was how he found her, just in her tee shirt. He and Susan were having an affair and she made him feel like she loved him and

cared for him more than his wife did. He did not have to steal her money because she gave it to him freely and knew he would pay her back, like he did the first time he cleared her account. 16:27-28.

He felt remorse about Susan's death and still feels remorse. 16:31.

He did not tell Hawley, Shirah, or Cordell that he killed Susan. 16:30, 39-41.

As far as he could remember, Dykes drove herself to work on Monday, October 2. He got home after she did and was there until 11:00 or 11:30. He asked if he could use $100 to buy a fuel pump but used the money to buy crack. He was heading to town on his bike when he got a text message from his friend Chris. She wanted him to get some crack, so he went to her house, took her Explorer, went to town, and made the first $100 withdrawal. He was out most of the night, buying crack and getting money. He found Susan dead about 4, 4:30, 5 o'clock. Chris didn't want him to take the Explorer to Heritage Apartments, where he was going to get more crack, because her daughter lived there. So he drove to Susan's to see if he could borrow her car. That's when he found her dead. He freaked out and got the hasp and lock to put on the front door because he didn't know who had a key to the trailer. The hasp on the back

door was already there. He never put the new hasp and lock on the front door though and may have returned them. 16:39-49.

When he found her, she was face down on the floor with her head lying in a puddle of blood. A rope was around her neck or mouth and tied to one end of the bat. The other end of the rope was tied to her right thigh. She was ice cold. He cut the rope with his pocket knife because he was high and freaked out and didn't know what to do. He put her body in the closet by the bathroom and closed the door until he could figure out what to do. He slung the bat and it landed in the master closet. There were clothes all over the floor, and he put some of the clothes over the blood stains. 16:49-52. He may have put her pants in the clothes hamper.

The body stayed in the trailer until the morning of October 4th. When he left his wife that morning, he took Gillis' boat back to Susan's on top of the car. He loaded the body into the boat and drove to Lake Cassidy with the body inside the boat on top of the car. 16:71.

Asked how Dykes called her workplace on Tuesday morning if she was already dead, Williams said they must be mistaken. If she had called, she would have used her cell phone, and there was no record of it on her cell phone. Also, she would have driven her car, but he was driving her car that Tuesday. Don

Cloer saw him in her car. The neighbors also saw him driving her car on Tuesday. 16:54-55.

Asked about the video surveillance photos from October 3, Williams said he was in Chris' Ford Explorer in the 12:18 and 1:56 photos and was in Susan's car in the others. You could tell by where the window pane was that he was sitting in something more like a truck than a car in the earlier photos. Chris lived in Water Oaks Trailer Park. 16:66-67.

The week before Susan was killed, she was coming home with crack cocaine every day. She didn't have money to buy it, so she was probably fronting for it. They last did crack together Friday or Saturday. 16:67-68. Williams first told someone he found Susan when he told his lawyers the day the jury was picked. 16:69.

Dykes' daughter and son testified about the impact of their mother's death on their lives. 16:59-65, 72-75.

Sentencing

On May 13, 2008, the trial court followed the jury's recommendation and imposed the death sentence. The court found four aggravating circumstances: the crime was committed to avoid arrest; the crime was committed for pecuniary gain; the crime was cold, calculated, and premeditated; and the crime was especially heinous, atrocious, and cruel. In mitigation, the trial court found Williams has a history as a polysubstance

abuser; Williams was on a cocaine binge at the time of the murder; Williams was chemically dependent at the time of the crime; Williams participated in an outpatient substance abuse treatment program ten to twelve months prior to the offense; Williams had a chaotic and unstable childhood and was repeatedly relocated and moved back and forth between his mother and aunt due to his mother's troubled life and the abuse he suffered from his stepfather; psychological testing shows Williams would not likely cause any violence in a controlled population such as a prison; psychological testing showed Williams is not a psychopath; Williams appears to have neuropsychological impairment which may be classifiable as Fetal Alcohol Effect Syndrome; Williams had good relationships with his aunt and cousins, has exhibited a caring and loving attitude towards his family and children, including his infant daughter and his wife Callie, and he desires to maintain and foster a good father-child relationship during his time of imprisonment; and Williams was a kind, courteous, and gentle friend and hard worker for his employer Pam Miller.[6] 3:570-580.

Notice of Appeal was timely filed on May 19, 2008. 4:606.

[6] The trial court's sentencing order is attached herein as **Appendix E.**

SUMMARY OF THE ARGUMENT

Issue 1. The trial court erred in finding the murder was cold, calculated, and premeditated, as the state's own evidence established that Williams killed the victim while high on cocaine during an argument over drugs or his use of her ATM cards.

Issue 2. The trial court erred in finding the avoid arrest aggravating factor where the evidence showed the killing was the result of a spontaneous confrontation over drugs or misuse of the victim's ATM card. Inmate Hawley's testimony that Williams said "once he started" he had to kill her because he didn't want to go back to prison indicates avoiding arrest was at best a secondary motive.

Issue 3. The trial court erred in finding the murder was heinous, atrocious, and cruel where the medical examiner testified the first blow could have killed the victim, any of the blows could have rendered her unconscious, and the entire attack could have taken place in seconds.

Issue 4. The trial court erred in finding the pecuniary gain aggravating factor based on Williams anticipated use of her car and trailer temporarily. The trial court's finding that Williams anticipated using the car and trailer is based on speculation, and even if he had been thinking about that when he killed her, that was not a reason for the killing.

Issue 5. The trial court erred in rejecting the mitigating circumstance that Williams could not conform his behavior to the requirements of the law at the time of the murder. The evidence of this mitigating factor was uncontroverted. However, the trial court improperly rejected the expert's opinion and based his decision on speculation and his own personal views about the effects of crack cocaine on addicts.

Issue 6. The death sentence is inappropriate because no aggravating circumstances exist.

Issue 7. Florida's capital sentencing proceedings are unconstitutional under the sixth amendment pursuant to Ring v. Arizona.

ARGUMENT[7]

Issue 1

THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

This aggravating circumstance applies where the killing was the product of cold calculation, and the defendant had a careful plan to kill before the crime began. Here, the state hypothesized, and the trial court found, that Williams planned the crime in advance. Yet this finding is contradicted by the state's own evidence, which showed that Williams, while high on cocaine, killed Dykes during an argument over drugs and/or his use of her ATM cards rather than after cold calculation. Accordingly, this aggravating factor cannot be sustained.

A trial court's ruling on an aggravating circumstance will be upheld if the court applied the correct rule of law and its ruling is supported by competent, substantial evidence. Almeida v. State, 748 So.2d 922 (Fla. 1999). Competent, substantial evidence means legally sufficient evidence. Id.

In finding this aggravator, the trial judge stated:

> KIRK WILLIAMS' decision to kill Susan Dykes, however poorly conceived, was made in the early morning hours of Tuesday, October 3rd, 2006, as he realized that he would be going to prison if she lived to charge him with grand theft. At about 5:12 a.m.,

[7] These arguments assume, without conceding, appellant's guilt of the murder.

> on October 3rd, 2006, the defendant purchased the hasp and lock at Wal-Mart with the intent to secure the eventual crime scene. The timing of the hasp and lock purchase and its installation on the rear door of the trailer leads to the conclusion that the defendant planned to commit the murder and secure the crime scene. The defendant had time to reflect on his planned murder of Susan Dykes and did so. The testimony of William Hawley was that the defendant told him that he committed the murder because he knew he would go back to prison.
>
> The defendant (at the Spencer hearing) testified that he purchased the hasp and lock for the purpose of securing the door to Susan Dykes' trailer. This admission by the defendant confirms that the purchase of the hasp and lock was done with the intent to kill Susan Dykes.

3:575.

In order to establish the CCP aggravator, the evidence must show that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); the defendant exhibited heightened premeditation (premeditated); and the defendant had no pretense of moral or legal justification. Jackson v. State, 648 So.2d 85, 89 (Fla. 1994); Walls v. State, 641 So.2d 381 (Fla. 1994). This Court has defined heightened premeditation as "a cold-blooded intent to kill that is more contemplative, more methodical, more controlled than that necessary to sustain conviction for first-degree murder." Nibert v. State, 508 So.2d 1, 4 (Fla. 1987).

Each of these elements must be proved beyond a reasonable doubt. Banda v. State, 536 So.2d 221, 224 (Fla. 1988), cert. denied, 489 U.S. 943 (1974).

Accordingly, impulsive or panic killings do not qualify for CCP. See Mahn v. State, 714 So.2d 391 (Fla. 1998). Killings during domestic arguments likewise do not qualify for the CCP aggravator. Spencer v. State, 645 So.2d 377 (Fla. 1994). Furthermore, defendants under the influence of excessive drugs or alcohol have been deemed incapable of forming the degree of premeditation required for CCP. White v. State, 616 So.2d 21 (Fla. 1993); Penn v. State, 574 So.2d 1979 (Fla. 1991).

In the present case, the trial court's finding of CCP is based largely on Williams' purchase of the hasp at 5:12 a.m. on Tuesday, October 3, and Hawley's testimony that Williams said he killed Dykes to avoid going back to prison. The trial court inferred from this evidence that Williams calmly decided to kill Dykes as he was withdrawing money from her account (and using it to buy, and then smoke, crack cocaine) because he feared she would charge him with theft. Based on the record of her having called D-train's main office Tuesday morning, the court inferred that Williams killed her "sometime after she had returned from work" that same Tuesday. 3:573. This was the state's theory,

and the trial court accepted it lock, stock, and barrel.[8]

The state's theory is inconsistent, however, with the only direct evidence of what happened--the testimony of William Hawley, Bill Shirah, and Joseph Cordell relating Williams' statements about the killing. Hawley testified that Williams said he was on a crack cocaine binge and the victim threatened to turn him in because he was using her ATM cards. They got into a physical confrontation, he hit her with the bat, and once he started, he knew he had to kill her because he didn't want to go back to prison. Shirah testified that Williams said Dykes was coming home with crack cocaine every day, that he was on drugs, and he killed her for the crack. Cordell testified that Williams said Susan told him she wasn't going to smoke any more crack with him because he stole her money, and they argued, knocking over some tools, and he picked up a bat and hit her in the head. The state relied on these statements to establish the circumstances of the killing. Though the details differed somewhat, the critical consistency in the testimony of these

[8] The trial judge's sentencing order, with the exception of several minor parenthetical additions, recites almost verbatim the state's sentencing memorandum.

witnesses was that Williams killed the victim during an argument or physical confrontation.[9]

Furthermore, Hawley's testimony does not support the inference that Williams preplanned the killing. Hawley did not say Williams decided to kill Dykes when he was withdrawing money from her account. Hawley testified that Williams said they argued, he hit her with the bat, and "once he started, he knew he had to kill her." Hawley's testimony indicates the intent to kill arose after the violence began, not before.

Aggravating factors require proof beyond a reasonable doubt, "not mere speculation derived from equivocal evidence or testimony." Brooks v. State, 918 So.2d 181, 206 (Fla. 2005). Here, the trial court's finding that the murder was planned is not supported by the evidence. Furthermore, there are other reasonable inferences to be drawn from Williams' purchase of the hasp on Tuesday morning.

First, given the testimony of Hawley, Shirah, and Cordell, an alternative reasonable inference is that Williams' purchase of the hasp, sponge, and key ring on Tuesday morning had nothing to do with the murder, since they are common household items.

[9] The confessions were made in three separate conversations. Williams talked to Hawley in June 2007, to Shirah in October/November 2007, and to Cordell in December 2007.

Another cohesive reasonable hypothesis consistent with both the purchase of the hasp and the testimony of Hawley, Shirah, and Cordell is that Dykes was killed on Tuesday, October 3, sometime between withdrawals from the ATM, and that Williams bought the hasp to secure the trailer *after Dykes was killed.* This hypothesis is consistent with Williams' Spencer hearing testimony, in which although he denied killing Dykes, he said he found her dead in the early morning of Tuesday, October 3, between trips to the ATM. Williams testified that he bought the hasp after he found her dead,[10] and that the body remained in the trailer until Wednesday morning, when he transported it to the lake. The hypothesis that the killing occurred on early Tuesday morning is at least as consistent with the evidence as the state's theory that it was preplanned and took place late Tuesday night or early Wednesday morning.

The only evidence contradicting this alternative hypothesis is the hand-written note by D-Train employee Erica Rudolph that Dykes called in from her remote work site Tuesday, October 3, at 9:30 a.m., and Mr. Cloer's testimony that he had last seen Dykes

[10] According to Williams, the back door already had a hasp and lock in place but the front door did not, and he bought the hasp for the front door because he didn't know who might have a key. The state did not introduce into evidence the lock found on the back door, or a facsimile of the lock Williams purchased on October 3, or any testimony that the lock purchased matched the lock found on the door.

on the Tuesday afternoon before she disappeared. But the putative call to D-Train was not confirmed by Dykes' own cell phone record, or by any landline record, or by any evidence of the reliability of the company's manual recording system. Nor did Leon Anderson's testimony that she missed work on Wednesday establish that she was at work on Tuesday, as his testimony did not make clear that he, or anyone else at D-Train, would conclusively know whether or not Dykes was at work on any given day.[11] Interestingly, Dykes' cell phone did show she called the D-Train office on Monday morning at 9:15 a.m., the day before; the D-Train note could have the wrong date for this Monday call.

Nor was Mr. Cloer's testimony regarding the date he last saw Dykes particularly reliable. Coupled with his testimony that he last saw Dykes Tuesday afternoon was Mrs. Richards' testimony that Cloer had asked her that same Tuesday evening about Dykes' whereabouts because she still owed him rent. His comments to Richards make no sense if he had spoken to her only a few hours earlier. Cloer's testimony indicates confusion about other dates as well. He testified that he learned from

[11] Anderson testified: "If I'm not mistaken I received that Ms. Dykes did not show up to work. When they report to work they have to call the answering machine and pretty often we check the post itself. But with Ms. Dykes she's only missed one day when she's been working for me and I only checked her when she first started working here. After that I didn't have to check her anymore because she was always on time and never missed a day. That day she failed to come to work."

the neighbors on Friday, October 6, that a body had been found and that he called the Holmes County Sheriff's Department on Saturday, October 7. However, the body was not found until the morning of October 7.[12]

Also consistent with Dykes having died in the early Tuesday morning hours, she neither answered her phone nor made any outgoing calls after her final call to Williams on Monday at 9:45 p.m., despite the history of her regularly using her cell phone. Additionally, if Dykes was still alive on Tuesday, how did she get to work that day, and when and how did she get home? Callie's testimony indicates that she and Williams were using Dykes' car at least part of the day on Tuesday when they were together between noon and 9 p.m.

Furthermore, the state's theory that Williams planned the murder on Tuesday and killed her on Wednesday doesn't make much sense. Under the state's theory, Williams decided sometime before he purchased the hasp on Tuesday morning that he would kill Dykes. He did not then kill her, but, between trips to the ATM and while smoking crack, he bought a cheap hasp and lock to secure a door to prevent others from finding the body after he killed her later. He did not secure a weapon in advance, or

[12] Cloer's testimony also is curious in that he testified that Williams had been living with Dykes for several weeks prior to her disappearance, yet he was unable to identify Williams in court.

arrange for an alibi, disposal of the body, flight, or anything else. He only bought a cheap hasp for the door.

An alternative hypothesis is that Williams, in the midst of a crack cocaine binge, killed Dykes upon impulse when she confronted him about the ATM withdrawals, had no idea what to do once he realized she was dead, but tried to buy some time by securing the door to prevent anyone else who might have a key from entering in the mean time. This hypothesis is at least as reasonable as the state's theory. It fits the testimony of the three inmate witnesses, it fits the cell phone records, and it fits Williams' known movements and activities on October 3 and 4 based on ATM receipts, store receipts, various eyewitnesses (his wife and his neighbors), and his own testimony.

In conclusion, there are several alternative reasonable hypotheses of how and when the murder took place that negate the "cold" element, the "careful plan" element, and the "heightened premeditation" element required for the CCP aggravating factor to apply. The state's own evidence from three separate witnesses shows the killing arose from an argument with the victim while Williams was high on cocaine. And, although the trial court did not address the "cold" requirement, the court found that Williams was a crack addict and was on a cocaine binge when he killed Dykes, thus negating the cold requirement. See White; Penn. This finding, along with the descriptions of

the impulsive nature of the killing given by Hawley, Shirah, and Cordell negate CCP, regardless of when the killing took place.

If the evidence can be interpreted to support CCP, as well as a reasonable hypothesis other than a CCP killing, the CCP factor has not been proved. Mahn v. State; Geralds v. State, 601 So.2d 1157 (Fla. 1992); Eutzy v. State, 458 So.2d 755 (Fla. 1984). That is the case here. Accordingly, this aggravator cannot be sustained. It was error for the trial judge to instruct the jury on this aggravating circumstance or to consider this aggravating circumstance as a reason for imposing the death sentence. This error requires reversal for a new penalty phase proceeding.

Issue 2

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE DOMINANT MOTIVE FOR THE MURDER WAS TO AVOID ARREST.

In order for this aggravating factor to be sustained when the victim is not a law enforcement officer, the evidence must show beyond a reasonable doubt that "the dominant or only motive for the murder was to eliminate a witness." Floyd v. State, 497 So.2d 1211, 1215 (Fla. 1986); see also Urbin v. State, 714 So.2d 411 (Fla. 1998); Jackson v. State, 575 So.2d 181 (Fla. 1991);

Livingston v. State, 525 So.2d 817 (Fla. 1988). Here, the evidence showed the primary impetus for the violence was an argument over drugs and/or Williams' use of the victim's ATM. Avoiding arrest was at most a secondary motive. Accordingly, this aggravating circumstance cannot be sustained.

The standard of review is as stated in Issue 1, supra, at page 35.

In finding this aggravator, the trial judge stated, in pertinent part:

> The testimony of prisoner William Hawley, a cellmate of the defendant at the county jail after defendant's arrest, is direct evidence that establishes beyond a reasonable doubt that the defendant acted upon his fear of arrest and imprisonment. Hawley credibly testified that the defendant admitted to him that he had robbed the victim's checking account, that she threatened to turn him in for prosecution, and that he killed her because he did not want to go back to prison as he had been there before. This was clearly the dominant motive for defendant's murder of Susan Dykes.
>
> The defendant's admission to inmate Hawley that he killed the victim to avoid another prison sentence supports application of this aggravating circumstance.[]
>
> The defendant's failure to flee the area or from his bail bondsman belies his fear of arrest. The defendant obviously had taken steps to avoid detection rather than simply running after committing the murder. The defendant purchased the hasp and lock to secure the crime scene (to secure the back door of the trailer). The defendant stole his father-in-law's boat to transport the body. With "muletape" rope, the defendant tied concrete blocks to the defendant's [sic] body and from the boat sank her body in Lake Cassidy. The defendant began or attempted to clean the blood stains from the crime scene inside the trailer. The defendant mistakenly believed that he

> had more time to cover up the crime and did not expect, at that time, his arrest (on unrelated charges) by the bail bondsman Buel Mooney. The defendant was surely surprised by the body of the victim floating to the surface of the lake and being found.
>
> . . . .
>
> The defendant had twice before been sentenced to state prison. The defendant had used the victim's ATM card on August 20th, 2006, to completely wipe out and overdraw her checking account. On Tuesday morning, October 3rd, 2006, the defendant again completely wiped out and overdrew her checking account. There was evidence from the victim's employer establishing that Susan Dykes was very concerned about maintaining her employment. There was also evidence from Susan Dykes' landlord that she was behind in her rent-to-buy payments for her mobile home. All of this circumstantial evidence conclusively demonstrates that the defendant had reason to fear that Susan Dykes would charge him with the theft of her bank funds resulting in his certain conviction and imprisonment.
>
> Finally, any assertion that the defendant would not fear charges by the victim due to his October 3rd thefts from her checking account because she had not filed a complaint (after his earlier thefts from her account on August 20) is not worthy of belief; it is directly rebutted by the testimony of William Hawley; and it is also controverted by the probability that Susan Dykes would not likely forgive the defendant again when the evidence from her employer and landlord demonstrated that she was in dire financial straits.

3:570-571.

In order to sustain the avoid arrest aggravating factor, the state's evidence that witness elimination was the dominant motive must be "very strong." Riley v. State, 366 So.2d 19 (Fla. 1978); see also Zack v. State, 753 So.2d 9, 20 (Fla. 2000)(avoiding lawful arrest aggravator "requires strong proof that the dominant motive for the murder was witness

elimination"); Pomeranz v. State, 705 So.2d 465, 471 (Fla. 1997)(this aggravator "cannot be found unless the evidence clearly shows that the elimination of the witness was the sole or dominant motive for the murder").

Here, the trial court found the avoid arrest aggravator based on "the defendant's admission to William Hawley that he killed the victim to avoid another prison sentence." This finding is an incomplete and misleading summary of Williams' admission to Hawley. Hawley testified that Williams said he was on a crack cocaine binge and the victim threatened to turn him in because he was using her ATM cards. They got into a physical confrontation and he hit her with the bat. Once he started, he knew he had to kill her because he didn't want to go back to prison. Based on Hawley's testimony, fear of going back to prison was a secondary motive, not the impetus for the force or violence in the first place. The testimony of state witnesses Shirah and Cordell also negates avoiding arrest as the primary motive for the killing. Shirah testified that Williams said he was on drugs and he killed the victim for crack. Cordell testified that Williams said the victim told him she wasn't going to smoke any more crack with him because of him stealing her money, they argued, one thing led to another, and he hit her with the bat.

In Urbin, this Court held the avoid arrest aggravator could not be sustained where the evidence showed the defendant killed the victim because he "bucked" (resisted the robbery) and because he saw the defendant's face. Three witnesses testified to Urbin's statements about the shooting. Ambrose testified that Urbin said he was reaching for a wad of money in the victim's pocket when the victim kicked him in the leg and that's when he shot him. Flatebo testified that Urbin said he shot the victim because he bucked and because he had seen his face. Mann testified that Urbin told him that he killed the victim because he resisted the robbery. On these facts, this Court concluded the avoid arrest aggravator could not be sustained. The Court noted that although Flatebo testified that Urbin shot the victim because he bucked and because he saw his face, this latter fact was a corollary, or secondary motive, not the dominant one.

Likewise, in Elam v. State, 636 So.2d 1312 (Fla. 1994), this Court held the trial court erred in finding the murder was committed to avoid arrest where, although Elam told a cellmate that the victim "had to be done away with to avoid his being found out," the evidence showed the murder took place as the result of a fight that erupted when the victim confronted Elam about stolen money. Id. at 1314.

Here, too, the evidence showed that Williams killed the victim during a spontaneous argument over drugs and/or his use

of her ATM card. Eliminating her as a witness was a secondary motive according to only one of the three witnesses, and not the dominant motive. This aggravating circumstance therefore cannot be sustained. It was error for the trial judge to instruct the jury on this aggravating circumstance or to consider this aggravating circumstance as a reason for imposing the death sentence. This error requires reversal for a new penalty phase proceeding.

Issue 3

THE TRIAL COURT ERRED IN FINDING THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL.

This aggravating circumstance applies only where there is proof beyond a reasonable doubt that the victim experienced prolonged physical pain or mental anguish. Here, the evidence established that the victim may have been killed or rendered unconscious within seconds. Accordingly, this aggravating circumstance cannot be sustained.

The standard of review is the same as that stated in Issue I, supra, at page 35.

In finding this aggravator, the trial judge stated:

> The defendant **KIRK WILLIAMS** brutally beat to death Susan Dykes with an aluminum baseball bat. Susan Dykes was 5-feet 1-inch in height and weighed 95 pounds. Her blood and hair were found on the baseball bat and also down both the front and back of her jean pants. Sometime while he carried out the murder, the defendant removed her jeans and underwear. He bound her torso and both feet to three concrete blocks,

> threw her body overboard from a boat and sank her body in Lake Cassidy. The multiple lacerations and locations of the lacerations around the head indicate that Susan Dykes' head was moving as the blows were inflicted. No other reasonable conclusion can be drawn other than Susan Dykes was conscious and standing at least long enough for the blood from her head injuries to reach both the front and back sides of her jeans in the manner in which the jeans are blood-stained. Susan Dykes was without a doubt acutely aware of her impending death and the pain associated with the terrible blows (which bent the aluminum bat). Then, while Susan Dykes was obviously still alive, the defendant gagged her with some of the muletape rope; there is no need to gag a dead person.
>
> Dr. Cameron Snider, an Associate Medical Examiner, testified in the guilt phase of the trial proceedings. His review included the autopsy report, autopsy photographs, several crime scene photographs of the recovery of the body from Lake Cassidy, and some of the sheriffs' offices' investigator narratives. Dr. Snider opined that the manner and cause of Susan Dykes' death was homicide by blunt head trauma, or injuries of the head; and that the injuries to Susan Dykes were consistent with having been struck with an elongated, hard instrument striking the head (such as the baseball bat).
>
> Dr. Snider testified that Susan Dykes had suffered injuries including (1) five lacerations or tears (each 3-7 centimeters in length) to the scalp from a blunt forced instrument striking the head multiple times; (2) bruising or hemorrhages under the surface of the scalp and into the galeum (a tough fibrous cover underneath one's scalp and over the bone or skull), and (3) a subdural hematoma (in other words, bleeding on the surface of the brain beneath the skull).

3:575.

The especially heinous, atrocious, and cruel aggravating circumstance (HAC) applies "only in torturous murders," those

that inflict "a high degree of pain," either physical or mental. See Chere v. State, 579 So.2d 86, 95 (Fla. 1991); Rose v. State, 787 So.2d 786, 801 (Fla. 2001). A few minutes are enough if the victim is conscious. See, e.g., Brown v. State, 721 So.2d 274, 277 (Fla. 1988). A finding of HAC, however, cannot be based on the mere possibility that the victim may have suffered extreme pain or mental anguish. See Brown v. State, 644 So.2d 52 (Fla. 1994)(medical examiner's testimony that victim had been stabbed 3 times and none of wounds was immediately fatal held insufficient to prove HAC); Ferrell v. State, 686 So.2d 1324, 1330 (Fla. 1996)(speculation that the victim may have realized that the defendants intended more than a robbery when forcing the victim to drive to the field insufficient to support HAC). In order to sustain the aggravating circumstance, there must be "no doubt" the victim suffered physical or mental torture. See Chavez v. State, 832 So.2d 730 (Fla. 2002)(HAC properly found where victim, who was held captive for 3-1/2 hours, twice asked defendant if he was going to be killed and was sobbing throughout this period).

Accordingly, although a beating usually will cause a high degree of pain, this Court has rejected the HAC factor in beating deaths where the victim may have been rendered unconscious after the first blow. See Zakrzewski v. State, 717 So.2d 488, 493 (Fla. 1998)(trial court erred in finding HAC

where medical examiner's testimony established that victim may have been rendered unconscious upon receiving first blow from the crowbar); Elam v. State, 636 So.2d 1312 (Fla. 1994)(trial court erred in finding HAC where medical examiner testified attack took place in a very short period of time and victim was unconscious at end of this period).

In the present case, contrary to the trial court's finding, the evidence did not show that Dykes was alive or conscious after receiving the first blow. The medical examiner testified that the first blow could have resulted in death and that "any of the blows could have resulted in unconsciousness." The medical examiner further testified that the entire attack could have taken place in seconds.

In finding HAC, the trial judge did not even refer to the medical examiner's testimony, discussed immediately above. Instead, the judge inferred from the lacerations on her head that the victim was moving her head, and therefore conscious, as the blows were inflicted; inferred from the blood on the Jordache jeans that she was standing while struck for a period of time long enough to be aware of her impending death; and inferred from the rope around her head that the defendant gagged her while she was alive.

Not only did the trial judge ignore the medical examiner's testimony, the trial judge's description of the victim's ordeal

is largely speculation and conjecture. Although a sentencing judge may evaluate the victim's mental state in accordance with common-sense inferences from the circumstances, Swafford v. State, 533 So.2d 270, 277 (Fla. 1988), here, the trial judge speculated on matters that normally fall within the realm of expert knowledge. The trial judge's inferences are not reasonable nor are they the only inferences that can be drawn from the evidence.

First, the trial judge's conclusion that the victim must have been moving her head when the blows were inflicted (and thus was conscious) is unreasonable. A blow to an object obviously is going to move that object, and thus a blow to the head by a bat will move the head. The lacerations to different areas of the victim's head do not prove that she herself was moving her head; it only means that the blows were delivered to different parts of her head. This evidence does not prove the victim was conscious after the first blow.

Nor do the blood stains on the jeans prove the victim was alive or conscious after the first blow. First, there was no proof that Dykes was wearing the Jordache jeans when she was attacked; there was no proof that the blood on the jeans was deposited at the time of Dykes' death as opposed to at an earlier time from an unrelated injury; and there was no expert testimony establishing that blood from her head could even have

landed on the jeans where they are stained had she been hit in a standing position if she had been wearing the jeans.[13] There also was no proof that the blood stains were from spatter at the moment of killing as opposed to being smeared on the jeans after her death, if, for example, the jeans were used in an attempt to clean up the blood on the floor. Most importantly, however, even if Dykes was wearing the jeans and standing when she was killed such that the blows caused blood to land on both sides of her jeans, as the trial judge speculated, *the attack still could have taken place within seconds*, as the medical examiner testified. The medical examiner's testimony was unequivocal: any of the blows could have rendered her unconscious and the entire attack could have taken place in seconds.

Finally, the trial judge's conclusion that the rope around the victim's mouth proved she was alive and aware of her impending death also is pure speculation. There is no evidence the rope was placed on the victim's head while she was still alive or conscious or that it was placed there as a gag, i.e., to keep her quiet. The rope could have been placed around her head after she was dead at the same time the other ropes were placed around the other parts of her body to be attached to

[13] The crime scene analyst testified there was blood in the crotch area, from the front to the back. 10:394.

cinder blocks.[14] Furthermore, even if the rope was placed there while the victim was alive, there is no evidence she ever regained consciousness.

Evidence of pain or fear of impending death must be based on more than mere speculation. In Brown, for example, the trial court found HAC based on its conclusion that the stabbing victim had moved either in an effort to stand or evade his attacker. An expert in blood pattern interpretation testified that the victim was alive and conscious based on the location and trail of blood spatter in the bedroom and the medical examiner testified that the abrasions on the victim's shoulder would not have occurred had the victim been still during the attack. The Court thus held it was reasonable for the trial court to conclude the victim was conscious at the time of the attack and aware of what was happening. 721 So.2d at 278 & n.8.

Here, in contrast, the state's "theory"--that the victim was standing when the blows were delivered, that she was conscious after the first blow, and that she suffered physical pain and mental anguish-—was not supported by any expert

[14] Also, the evidence about whether the piece of rope attached to the head was also attached to a cinder block was conflicting. Investigator Eaton, who observed the body at the lake after it was pulled from the water, testified that all the pieces of rope were attached to cinder blocks. The medical examiner testified that when the autopsy was conducted, on October 9, the rope attached to the head was not attached to a cinder block.

testimony or other competent substantial evidence. Aggravating factors require proof beyond a reasonable doubt, not mere speculation derived from equivocal evidence or testimony. Brooks v. State, 918 So.2d 181, 206 (Fla. 2005). Here, while the trial court's speculation as to what took place may have occurred (though it's unlikely, given the medical examiner's testimony), there is no evidence in the record to rule out other possible scenarios (that she was not wearing the jeans, that the blood on the jeans was smeared rather than spattered, that even if wearing the jeans and standing, she was dead or unconscious after the first blow, etc.).

The state failed to prove there was prolonged suffering or anticipation of death, and it was error for the trial judge to instruct the jury on this aggravating circumstance or to consider this aggravating circumstance as a reason for imposing the death penalty. Williams is entitled to a new penalty phase proceeding.

Issue 4

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE KILLING WAS MOTIVATED BY FINANCIAL GAIN.

In finding this aggravator, the trial court found that Williams' "anticipated" using the victim's residence and car,

not that he killed her in order to gain those benefits. This aggravator can be found, however, only where the evidence shows that financial gain was a reason for the killing. Accordingly, this aggravating circumstance cannot be sustained.

The standard of review is the same as that stated in Issue 1, supra, at page 35.

In finding this aggravator, the trial judge wrote, in pertinent part:

> The evidence establishes that the defendant **KIRK WILLIAMS** clearly planned and anticipated to further benefit from the murder by obtaining the use of the victim's home, car and other personal property (within her home).
>
> . . . Although the defendant had already stolen all of the money from the victim's checking account in the early morning hours of Tuesday, October 3rd, 2006, he planned to further benefit from the murder by using her home, car and other personal property.
>
> On Tuesday, October 3rd, at about 5:12 a.m., with Susan Dykes' ATM card, the defendant purchased a hasp and lock at Wal-Mart (When law enforcement initially arrived at the victim's trailer during their investigation, they sawed this hasp and lock which was affixed to the back door of the victim's trailer). The defendant's last ATM withdrawal looting her account was made at about 6:32 a.m. that morning. At about 9:30 a.m. on October 3rd, the victim placed a call from her job site to check in with her security company employer's main office and spoke with the secretary/corporate supervisor (as she testified at trial and as reflected in the secretary's office memo for that morning). At some time after that phone call, on October 3rd, the defendant murdered Susan Dykes after she had returned home from work; she failed to show for work as scheduled on the morning of October 4th as her supervisor testified. If not for the defendant's surprise arrest by bondsman Buel

> Mooney on Friday, October 6th, 2006, he would have continued to occupy the victim's trailer, continued to drive her car, and continued to use the personal contents of her home.
>
> The defendant did not merely take the victim's car as an afterthought or means of escape. He knew he was not going to run away but instead was planning to conceal the murder and benefit at least temporarily from the use of the victim's home, car, and other personal property. . . . . The defendant was destitute. He had no job, no money, no home, and no operable vehicle and was anxious to satisfy his ravenous crack cocaine addiction. Although pecuniary gain was a part of the circumstances, it was not the sole or dominant motivation for this murder.

3:573-574.

Although pecuniary gain does not have to be the sole or dominant motive for the killing in order to instruct on this aggravator, the state must prove beyond a reasonable doubt that the killing was motivated, at least in part, by a desire to obtain money, property, or other financial gain. Green v. State, 907 So.2d 489 (Fla. 2005); Finney v. State, 660 So.2d 674 (Fla. 1995). In other words, the murder must have been an "integral step in obtaining some sought-after specific gain." Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988); Finney.

Here, the trial judge based its finding of the pecuniary gain aggravator on Williams' purported "anticipation" that he would use Dykes' car and live in her residence at least temporarily after he killed her. Anticipating a benefit is not the same thing as killing in order to obtain that benefit.

Thus, even if Williams anticipated that he would use Dykes' car and live in her trailer after he killed her,[15] the crime didn't occur because he wanted "to obtain those sought-after" benefits, nor did the trial judge find this was the reason for the murder. The trial judge found only that pecuniary gain "was a part of the circumstances."

Furthermore, Williams already had use of the victim's car, home, and personal property within her home; it makes no sense to say Williams killed for access to material things he already had access to. If anything, killing Dykes would threaten his continued access to her property and ATM cash.

There doesn't appear to be any evidence at all indicating the murder was motivated by a desire to obtain financial gain. The only direct evidence of what occurred was the testimony of the three jailhouse informants--Hawley, Shirah, and Cordell-—all three of whom testified Williams said he was high on cocaine and killed Dykes during an argument over crack or his use of her ATM card. Their testimony did not even suggest, much less prove, that the killing was motivated by financial gain. The trial court's finding of this aggravator is not supported by competent, substantial evidence.

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[15] It's pure speculation by the trial judge that Williams was thinking ahead in this manner. There is no evidence Williams planned to use Dykes' car or stay in her home after he killed her.

The state failed to prove the killing was motivated by financial gain, and it was error for the trial judge to instruct the jury on this aggravating circumstance or to consider this aggravating circumstance as a reason for imposing the death sentence. This error requires reversal for a new penalty phase proceeding.

Issue 5

THE TRIAL COURT ERRED IN FAILING TO FIND THE MITIGATING FACTOR THAT WILLIAMS' ADDICTION TO COCAINE SUBSTANTIALLY IMPAIRED HIS ABILITY TO CONFORM HIS BEHAVIOR TO THE REQUIREMENTS OF THE LAW AT THE TIME OF THE HOMICIDE.

A trial court may reject a mitigating circumstance only if the record contains competent substantial evidence to support that rejection. Here, the evidence of this mitigating circumstance was uncontroverted. However, the trial judge rejected the expert's opinion and based his decision on speculation and his own personal views about the effects of crack cocaine on addicts. Accordingly, it was error for the trial court to find that this statutory mitigating circumstance was not established.

In rejecting the impaired capacity mitigating circumstance, the trial court stated:

> The murder was committed because the defendant appreciated the criminality of his theft from the

victim and the consequences of prosecution and imprisonment. The defendant took steps to conceal his criminal act of murder by locking and securing the crime scene at the victim's trailer, by disposing of the victim's body, by attempting to clean the blood stains from the floor in the trailer, and by attempting to dispose of evidence.

Dr. James D. Larson, the defense's forensic psychologist (with extensive clinical and courtroom experience) testified that the defendant was able to appreciate the criminality of his conduct.

Dr. Larson did opine that the defendant's capacity to conform his conduct to the requirements of law was substantially impaired due to his abuse of cocaine; however, the facts of this case show otherwise.

The defendant made considered choices to feed his cocaine habit and to avoid arrest. Despite defendant's use of cocaine, he was able: (1) to operate the victim's motor vehicle without accident or incident; (2) to operate the ATM machines on multiple occasions to obtain the victim's funds; (3) to formulate his decision and plan to murder the victim and to secure the crime scene; (4) to enter the Wal-Mart store and purchase the hasp and lock without incident; (5) to gag the victim to prevent her from crying out; (6) to drive to his father-in-law's house and there tie his father-in-law's boat to the top of the victim's car and then drive back to the victim's trailer; (7) to remove the victim's body from the trailer and three concrete blocks and place them within the car or boat; (8) to drive them to Lake Cassidy; (9) to carefully position and tie concrete blocks to the body; (10) to maneuver the victim's tied and weighted body in the boat; (11) to maneuver the boat out onto the lake; (12) to lift and dump the weighted body overboard into the lake; (13) to return himself to shore; (14) to again secure the boat atop the car; (15) to drive back to the victim's trailer; and (16) to place the boat angled against the backside of the trailer (the boat *out-of-sight* from anyone who might pass by the trailer or from neighbors).

KIRK WILLIAMS' capacity to appreciate the criminality of his conduct **was not** substantially impaired.

> **KIRK WILLIAMS**' capacity to conform his conduct to the requirements of law **was not** substantially impaired, but rather his cocaine addiction led him to make a choice to steal the victim's money and then to deliberately murder her to avoid the consequences.

3:576-577.

Mitigating circumstances need not be proved beyond a reasonable doubt but must be found if established by the "greater weight" of the evidence." Ferrell v. State, 653 So.2d 367 (Fla. 1995); Campbell v. State, 571 So.2d 415, 419 (Fla. 1990). Accordingly, whenever a reasonable quantum of competent, uncontroverted evidence of mitigation has been presented, the trial court must find that the mitigating circumstance has been proved. Nibert v. State, 574 So.2d 1059 (Fla. 1990). A trial court may reject a defendant's claim that a mitigating circumstance has been proved only if the record contains competent, substantial evidence to support the court's rejection. Id.; see also Cook v. State, 542 So.2d 964, 971 (Fla. 1989)(trial court's discretion will not be disturbed if the record contains "positive evidence" to refute evidence of the mitigating circumstance). Moreover, this Court is not bound to accept a trial court's findings concerning mitigation if the findings are based on a misconstruction of undisputed facts or a misapprehension of law. Pardo v. State, 563 So.2d 77, 80 (Fla. 1990).

Thus, when expert testimony and opinion support a

mitigating circumstance, a trial judge can reject the testimony and opinion only where the record contains substantial competent evidence to refute it. See Coday v. State, 946 So.2d 988 (Fla. 2007); Walls v. State, 641 So.2d 381 (Fla. 1994); Nibert. A sentencing judge thus can reject expert testimony when it cannot be reconciled with other evidence in the case. Coday. However, a judge cannot reject expert opinion based on the judge's personal opinion or lay experience. See Alamo Rent-A-Car v. Phillips, 613 So.2d 56 (Fla. 1st DCA 1993); Jackson v. Dade County School Board, 454 So.2d 765 (Fla. 1st DCA 1984).

In the present case, Dr. Larson, a forensic psychologist, testified that Williams was a crack addict and was using heavily at the time of the homicide. Dr. Larson testified that despite his addiction, Williams would have known at the time he killed Dykes that what he was doing was criminal behavior, but that his cocaine addiction would have substantially impaired his ability to conform his behavior to the requirements of the law. "My experience with a crack cocaine binge is that when they're on a binge, they'll do – their judgment becomes so impaired, that they have poor control of their behavior. They'll do almost anything to get more drugs, so they don't conform their behavior to the requirements of law. I've seen it hundreds of times." 14:773. Dr. Larson continued: "It's not unusual for people on

a crack cocaine binge to keep using, keep using and then start engaging in criminal conduct to get more money so they can use some more." 14:774. Based on the police reports and other discovery he examined and his psychological testing, Dr. Larson concluded the violence was a function of the cocaine binge and Williams' compulsion for more cocaine.

Based upon this testimony and other evidence, the trial court found as mitigating that Williams had a history of polysubstance abuse, was a crack addict, and was on a cocaine binge when he killed Dykes. The trial court did not find, however, that Williams' ability to control his behavior was impaired, because (1) he planned the murder, and (2) Williams was able to drive a car, operate an ATM machine, buy items at a store, and dispose of the body after the murder.

First, as discussed in Issues I and II, supra, the trial court's conclusion that the killing was planned is not supported by competent substantial evidence.

Second, the trial court has misconstrued how the statutory mitigating factor should be considered, as well as Dr. Larson's testimony. Dr. Larson's testimony focused on the effects of crack cocaine on addicts, their compulsion to acquire more crack at any cost, and its effect on their ability to control their behavior. Dr. Larson testified that Williams' cocaine addiction impaired his ability to conform his behavior to the requirements

of the law when he killed Dykes, that is, he couldn't control his behavior *at the moment of the crime*. Dr. Larson did not testify, nor is there any other record evidence to suggest, that crack cocaine affects the brain such that an addict on a cocaine binge is unable to perform ordinary tasks like driving a car. The state did not challenge Dr. Larson's testimony, impeach his credibility, or offer a mental health expert of its own in response.[16] The state did not ask Dr. Larson if an addict, whose compulsion for more cocaine impairs his ability to control his behavior, is also unable to drive a car, operate an ATM machine, tie a rope, etc. Thus, there is no evidence in the record connecting Williams' ability to drive a car or purchase items in a store without incident to whether or not he could control his behavior at the moment of the crime.

Apparently, the trial court confused the standard for impaired ability to conform behavior to the law with "impairment," as used in association with the lack of functionality police officers attempt to determine in drivers suspected of drinking too much alcohol. That is, the trial court appears to have equated impaired capacity to control behavior at the time of the murder to drunkenness, when there is

[16] The trial court granted the state's request for an expert of its choosing to examine Williams and appointed Dr. Harry McLaren, but Dr. McLaren did not testify. 2:289-290.

no evidence they are related. Under the trial court's construction of the mitigating circumstance, there would have to be evidence that Williams was driving recklessly or otherwise behaving like a drunk. The trial court was looking at a different, and unrelated, issue from that addressed by the testimony and evidence at trial.

There is no record evidence to support the trial judge's assumption that a cocaine addict during a lengthy binge who can perform various activities like driving a car and rowing a boat necessarily can also control the impulse to act violently, that is, can conform his behavior to the law. Obviously, the effect of cocaine addiction on the brain and behavior is a subject beyond the common understanding of the average layperson, hence an expert witness. But here, the trial judge discounted or ignored the expert testimony and drew a conclusion about cocaine addiction based on his own personal views.

While an expert's uncontroverted opinion may be rejected, this Court has always required that rejection to have a rational basis, such as conflict with other evidence, credibility, or impeachment of the witness. Coday, 946 So.2d at 988. None of those reasons are present here. The judge's conclusion that Williams' ability to drive, shop, etc. meant he could conform his behavior to the law while on a crack cocaine binge is pure speculation and has no basis in the record.

Because Dr. Larson's opinion was unequivocal and not refuted, the trial judge improperly rejected the inability to conform mitigating circumstance based upon his own lay speculation and personal views about cocaine and its effects on behavior, and a misapprehension of the expert testimony. The mitigating factor of inability to conform behavior to the requirements of law was reasonably established by the greater weight of the evidence. Accordingly, the trial court erred in not considering this mitigating factor.

Issue 6

THE DEATH SENTENCE IS INAPPROPRIATE AS NO VALID AGGRAVATING CIRCUMSTANCES EXIST.

The death penalty is impermissible under the law of Florida where no valid aggravating circumstances exist. Elam v. State, 635 So.2d 1312 (Fla. 1994); Banda v. State, 536 So. 221 (Fla. 1988), cert. denied, 489 U.S. 1087 (1989).

In the present case, as argued in Issues 1-4, there are no valid aggravating circumstances. Accordingly, the death sentence is inappropriate.[17] Appellant notes that the state

[17] Appellant notes that the present case is factually similar to Elam, another case where this Court vacated the death sentence after finding no aggravating circumstances. In Elam, when the victim confronted Elam concerning some misappropriated funds, an altercation broke out, and Elam struck the victim in the head

originally concluded that the crime did not warrant the death penalty and offered Williams a plea bargain of life imprisonment, which Williams rejected. 7:15.

Issue 7

THE TRIAL COURT ERRED IN SENTENCING WILLIAMS TO DEATH BECAUSE FLORIDA'S CAPITAL SENTENCING PROCEEDINGS ARE UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO RING V. ARIZONA.

This issue was preserved by Williams' Motion to Declare Florida's Death Penalty Unconstitutional under Ring v. Arizona. 1:119-151, 2:265-266. The standard of review is de novo.

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with his fist, knocking him to the floor, and then picked up a brick and struck him several times in the head, killing him. The trial court found four aggravating circumstances, avoid arrest, HAC, pecuniary gain, and prior violent felony. The Court held the trial court erred in finding the murder was committed to avoid arrest as the evidence indicated the murder took place as the result of a spontaneous fight; erred in finding the murder was committed for pecuniary gain as the theft was complete when the fight broke out and the murder was not committed to facilitate it; erred in finding HAC as the bludgeoning could have taken place in less than a minute; and erred in finding the prior violent felony aggravator based on two solicitation offenses. Because there were no valid aggravating circumstances, the Court vacated the death sentence and remanded for life in prison. Similar to the present case, the state originally agreed to a plea bargain of life imprisonment until Elam insisted otherwise.

The death penalty was improperly imposed in this case because Florida's death penalty statute was unconstitutional in violation of the Sixth Amendment under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002). Ring extended the requirement announced in Apprendi v. New Jersey, 530 U.S. 446 (2000), for a jury determination of facts relied upon to increase maximum sentences to the capital sentencing context. Section 921.141, Florida Statutes (2003), does not provide for such jury determinations.

Williams acknowledges that this Court has adhered to the position that it is without authority to declare section 921.141 unconstitutional under the Sixth Amendment, even though Ring presents some constitutional questions about the statute's continued validity, because the United States Supreme Court previously upheld Florida's statute on a Sixth Amendment challenge. See, e.g., Bottoson v. Moore, 833 So.2d 693 (Fla.); cert. denied, 123 S.Ct. 662 (2002); King v. Moore, 831 So.2d 143 (Fla.), cert. denied, 123 S.Ct. 657 (2002).

Additionally, Williams is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and that legislative action is required. See, e.g., State v. Steele, 921 So.2d 538 (Fla. 2005). However, this Court continues to grapple with the problems of attempting to reconcile Florida's death penalty

statute with the constitutional requirements of Ring. See e.g., Marshall v. Crosby, 911 So.2d 1129, 1133-1135 (Fla. 2005) (including footnotes 4 & 4, and cases cited therein); Steele. At this time, Williams asks this Court to reconsider its position in Bottoson and King because Ring represents a major change in constitutional jurisprudence which would allow this Court to rule on the constitutionality of Florida's statute.

This Court should re-examine its holding in Bottoson and King, consider the impact Ring has on Florida's death penalty scheme, and declare section 921.141 unconstitutional. Williams death sentence should then be reversed and remanded for imposition of a life sentence.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse and remand this case for the following relief: Issues 1-4, vacate appellant's death sentence and reverse for a new penalty phase proceeding; Issue 5, reverse for resentencing by the trial judge; Issues 6-7, vacate appellant's death sentence and remand for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **STEPHEN R. WHITE**, Assistant Attorney General, The Capitol, Tallahassee, FL 32399-1050, and to **KIRK DOUGLAS WILLIAMS**, #D87934 Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this date, March 2, 2009.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), this brief was typed in Courier New 12 point.

_____

NADA M. CAREY
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

KIRK DOUGLAS WILLIAMS,
Appellant,

v. **CASE NO. SC08-965**
L.T. CASE NO. 06-CF-788

STATE OF FLORIDA,
Appellee.
_____/

APPENDIX TO INITIAL BRIEF OF APPELLANT

APPENDIX	DOCUMENT
A	D-Train incident report
B	Summary of the phone calls saved on Dykes' cell phone
C	Sentencing Memorandum
D	State's Sentencing Memorandum
E	Sentencing Order